Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-610
32446

In re Applications of	)	MM DOCKET NO. 93-107
	)	
DAVID A. RINGER	)	File No. BPH-911230MA
	)	
ASF BROADCASTING CORPORATION	)	File No. BPH-911230MB
	)	
WILBURN INDUSTRIES, INC.	)	File No. BPH-911230MC
	)	
SHELLEE F. DAVIS	)	File No. BPH-911231MA
	)	
OHIO RADIO ASSOCIATES, INC.	)	File No. BPH-911231MC
	)	
For Construction Permit for an FM Station on Channel 280A, in Westerville, Ohio	)	

MEMORANDUM OPINION AND ORDER

Issued: September 21, 1993 ; Released: September 23, 1993

1. Ohio Radio Associates (ORA) seeks a ruling on a "Motion to Enlarge Against Wilburn." They filed that motion on August 23, 1993 and want a financial qualifications issue and an EEO abuse of process issue added against Wilburn. Wilburn opposed ORA's petition on September 8, 1993. ORA replied on September 20, 1993.

Preliminary Ruling

2. ORA's motion is late-filed. Timely motions to enlarge issues should have been filed on or before May 24, 1993. See 47 CFR 1.229(b)(2) and 58 F.R. 21580 published April 22, 1993.

3. ORA claims their motion is timely; that it ". . .is based on the deposition testimony of Charles W. Wilburn and Bernard P. Wilburn, the two shareholders of WII, and is filed within fifteen (15) days of receipt of the deposition transcripts. . ."

4. That may be so. But it doesn't make the motion timely. Almost all of ORA's allegations have been available to it since December 30, 1991 when Wilburn filed their application. Even assuming that ORA hadn't done their homework in 1992, automatic document production in this case took place on May 10, 1993. So there is no excuse for ORA not having their financial allegations firmed up by June 9, 1993. ORA's motion is untimely in the extreme.

5. On this point, a party has no right to wait until after depositions are taken before moving to enlarge issues against their opponent(s). In fact, the Commission has specifically admonished them not to do so. See Discovery Procedures, 12 FCC 2d 185 (1968) at para 7. This

widespread procedural tactic of waiting until discovery is completed before moving to enlarge the issues is a procedure that should be discouraged. It prolongs hearings and frequently leads to two-phase or even three-phase hearings.[1/2]

The Financial Request

6. Since ORA's motion is untimely, their allegations must be analyzed under the Commission's reassessed Edgefield-Saluda doctrine. See Adjudicatory Re-Regulation Proposals, 58 FCC 2d 865 (1976) and 47 CFR 1.229(c). There (at 873-874) the Commission said this:

> ". . .An untimely motion to enlarge will be considered fully on its merits only if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing. It is expected that this standard will be strictly construed."

7. Giving ORA's financial allegations the strict construction they deserve they fail to pass muster. The record shows that Charles and Bernard Wilburn need $150,000 to construct and operate their Westerville proposal for three months without revenue. To meet that $150,000, Charles Wilburn has

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[1] ORA didn't file their enlargement request against Wilburn until one week after the direct case exhibits were exchanged (August 16, 1993), and the day after the evidentiary admission session was held (August 20, 1993). So ORA is obviously aiming for a Phase II hearing.

[2] At the present time the adjudicatory processors (the Trial Judges, the Review Board, and the Adjudication Division of the General Counsel's office) are giving untimely post-designation petitions to enlarge issues the run-of-the-mill treatment. We seldom analyze such petitions as they should be analyzed; i.e., akin to an infrequent request for extraordinary relief. Consequently, the filing of untimely post-designation enlargement petitions has become a routine, almost automatic ritual. Thus, we end up squandering judicial system resources, fostering adjudicatory inefficiency, and sanctioning trial by ordeal.

Our nonchalant processing of untimely enlargement requests obviously accrues to the tactical advantage of the RAMBO litigator. It enables him to delay the outcome of the proceeding, and it gives him an additional bargaining chip at the settlement table.

Moreover, it must be remembered that granting an untimely enlargement changes the basic fabric of the proceeding, reshapes the litigation, and alters the strengths and weaknesses of the parties involved. Adjudicatory processors would do well to give untimely enlargement requests the proverbial "hard look" before granting or denying them.

current assets of $300,000,[3] and his son, Bernard Wilburn has $164,500.[3] So ORA has failed to raise any financial questions of probable decisional significance. Nor can it be said that any of their allegations raise any questions of such substantial importance that they warrant a Phase II hearing.

8. Assuming that ORA's financial allegations were timely filed, they would still be rejected for any of three reasons. First, and being financial allegations, they must meet the standard the Commission laid down in Revised Processing Applications, 72 FCC 2d 202 (1979) at 222 (para.60). As noted in para 7 and Footnote 4 supra. Wilburn Industries is financially sound. And ORA has failed to show that Wilburn has misrepresented their finances or grossly omitted some decisionally significant financial item that would render their proposal totally defective.

9. Next, and even applying the less stringent standards of 47 CFR 1.229(d)'s ORA hasn't pleaded with the required sufficiency and specificity to warrant adding the issues they seek.[4]

10. Finally, Wilburn has not only demonstrated that they are financially qualified to follow through on their proposal, they have also demonstrated that they made a good faith attempt to budget the costs of construction and operation of their station. ORA's request for a financial issue will be denied.

The EEO Abuse of Process Issue

11. Wilburn, in its Opposition, is correct. ORA's attack on the character of its principals ". . .is patently frivolous. . ." Wilburn is aware of local groups, schools and media that need to be contacted once they receive a permit and begin to assemble a staff. And they are perfectly willing to contact such groups. There is simply no basis for ORA's assertion that Wilburn has disregarded the Commission's EEO policy in the past or will disregard that policy in the future.

12. Again, it is true that the Wilburns didn't perform the EEO ritual in a manner that we inside the Beltway expect it to be performed. But they sincerely tried to determine what the elements of a model EEO program are, and they seriously intend to implement that program. There is simply no merit to

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[3] Of these amounts, Charles Wilburn has $175,000 in cash and Bernard Wilburn has $39,500. Charles Wilburn has a net worth of over one-half million dollars and his son has a net worth of over one-quarter million dollars. Its true that because of inexperience the Wilburns failed to perform some of the financial rituals that we experienced communications people expect to be performed. But one thing is certain. The Wilburns have way more than enough money to carry out their Westerville project. They are financially qualified.

[4] 47 CFR 1.229(d) governs timely motions to enlarge issues. It provides in pertinent part that "[s]uch motions. . .shall contain specific allegations of fact sufficient to support the action requested. . ."

ORA's contention that Wilburn has abused the Commission's processes. ORA's request for an EEO abuse of process issue will also be denied.

SO the "Motion to Enlarge The Issues Against Wilburn" that Ohio Radio Associates filed on August 23, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge